

The stipulations are herein adopted by the Appeals Board as specifically set forth in the award of the administrative law judge.

ISSUES

The sole issue before the administrative law judge and this Appeals Board is the liability of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

(1) The Kansas Workers Compensation Fund is responsible for fifty percent (50%) of the costs and benefits awarded in this proceeding.

The claimant is a 36 year old woman who is a high school graduate. She was hired by Cessna Aircraft Company, the respondent, on March 6, 1989, as a sheet metal assembler. This job required the claimant to do riveting, drilling, bucking rivets, sanding, cutting sheet metal and clecoing sheet metal. She used tools such as rivet guns, bucking bars, files, sanders, and cleco pliers. The job required repetitive use of claimant's arms. Prior to going to work for respondent, the claimant denies having had problems with her upper extremities and denies filing any workers compensation claims.

This is the second of two claims the claimant has filed with regard to problems with her upper extremities. The claimant's first claim was for a repetitive use injury to the right upper extremity while working for the respondent. That claim was settled with the respondent on October 10, 1990.

In this proceeding, the situs of injury is the left arm. Claimant testified that she began having pain in both hands and wrists in the fall of 1989 after working for the respondent six or seven months. Claimant testified that the right hand hurt worse than the left at that time. Claimant first saw board certified orthopedic surgeon, J. Mark Melhorn, M.D. on March 5, 1990, who ultimately operated on the right wrist on May 23, 1990. As indicated above, the right wrist claim was settled with the respondent in October 1990.

After surgery to the right wrist, claimant was off work approximately six weeks. On July 12, 1990, Dr. Melhorn released claimant to return to work with no restrictions. On August 13, 1990, Dr. Melhorn re-evaluated claimant and placed restrictions on her which limited her working with pliers and riveting to six hours per day. Claimant returned to her former work in the sheet metal department.

From August 1990 through December 1990, claimant increasingly used her left arm because her right arm remained painful. As a result of protecting the right arm, claimant experienced injury to her left. Claimant returned to Dr. Melhorn for treatment and in January 1991, the doctor operated on the left elbow.

On July 31, 1992, Ernest R. Schlachter, M.D., prepared a report pertaining to claimant based upon a review of the medical records from the respondent, St. Joseph Medical Center, Dr. Mark Melhorn and Dr. Daniel D. Zimmerman. Dr. Schlachter believes that claimant's right upper extremity would have constituted a handicap in obtaining or retaining employment in the open labor market at the time of her return to work in July

1990. Dr. Schlachter also believes that claimant would not have incurred the injury and resulting disability to the left upper extremity but for the pre-existing right upper extremity impairment.

Dr. Melhorn also testified. He believes that claimant's symptomatology involving the injury on the left arm would have developed regardless of impairment to the right arm. Dr. Melhorn feels that the right arm impairment was a contributing component to the left arm injury and believes that fifty percent (50%) of the functional impairment to the left arm occurred as a result of the pre-existing impairment of the right upper extremity.

In this instance, the Appeals Board finds the opinion of Dr. Melhorn to be more persuasive than that of Dr. Schlachter. Dr. Schlachter did not personally meet with claimant before formulating his opinions, nor did he initially know of claimant's history that she had simultaneously developed problems in both upper extremities in the fall of 1989. Based upon the nature of claimant's work activities in the sheet metal department, the Appeals Board finds Dr. Melhorn's opinion more probably true than not that the impairment of the right upper extremity contributed fifty percent (50%) to the resulting disability to the left upper extremity, and that the injury to the left arm most likely would have been sustained without regard to the pre-existing impairment to the right arm.

Whenever a handicap employee is injured or is disabled or dies as a result of an injury and the administrative law judge finds the injury probably or most likely would have been sustained or suffered without regard to the employee's pre-existing physical or mental impairment but the resulting disability or death was contributed to by the pre-existing impairment, the administrative law judge shall determine in a manner which is equitable and reasonable the amount of disability in proportion to the cost of award which is attributable to the employee's pre-existing impairment, and the amount so found shall be paid from the workers compensation fund. K.S.A. 44-567(a)(2).

There is no question that the respondent had knowledge of claimant's impairment to the right arm prior to her sustaining permanent injury to the left arm in November 1990. As indicated above, claimant had received permanent partial disability benefits for injury to the right arm and had been given permanent work restrictions and limitations by Dr. Melhorn for injury.

Based upon the above, the award of Administrative Law Judge John D. Clark dated February 23, 1994, should be modified to assess liability against the Workers' Compensation Fund for fifty percent (50%) of the benefits and costs associated with this proceeding.

AWARD

WHEREFORE, the award of Administrative Law Judge John D. Clark dated February 23, 1994, should be, and hereby is, modified to order the Kansas Workers Compensation Fund to pay or reimburse fifty percent (50%) of the costs and benefits associated with this claim.

IT IS SO ORDERED.

Dated this ____ day of July, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: D. Steven Marsh, 600 Epic Center, 301 N. Main, Wichita, KS 67202
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John D. Clark, Administrative Law Judge
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